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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

HENRIK SARDARIANI et al., Plaintiffs and Appellants, v. RAYMOND AVER, Defendant and Respondent.	B207706 (Los Angeles County Super. Ct. No. BC358121)

APPEAL from the judgment of the Superior Court of Los Angeles County. Jane Johnson, Judge. Affirmed.

Smyth Law Office and Andrew E. Smyth for Appellants.

Law Offices of Raymond H. Aver and Raymond H. Aver for Respondent.

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INTRODUCTION

While in escrow for the purchase of a residence owned by Ahmad and Saeideh Nikakhtar, purchaser Yeranoohi Sardariani, and her son Henrik, arranged to pay off a junior lienholder that was about to foreclose on the residence. Before the escrow could close, the senior lienholder foreclosed and the residence was sold to third party bidders. The foreclosure trustee disbursed the surplus proceeds to the Nikakhtars' attorney, respondent Raymond Aver, who in turn turned over the proceeds to his clients.

The Sardarianis sued Aver for conversion, alleging the surplus proceeds disbursed by the foreclosure trustee belonged to them, not the Nikakhtars, because Mr. Sardariani had a deed of trust against the residence. They asserted that the trust deed, obtained as a result of paying off the junior lienholder, constituted a valid lien. The trial court dismissed the action against Aver after sustaining a demurrer that the Sardarianis had failed to state a cause of action for conversion. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

After the Nikakhtars filed for bankruptcy, they entered into an agreement with Yeranoohi Sardariani to sell their Hidden Valley residence. An escrow for the sale was opened.

The residence was subject to three deeds of trust: the first was held by GMAC Mortgage, the second by The Harris Family Trust (Harris Trust), and the third by Mohammad Tavakkoli. The Harris Trust obtained relief from the automatic bankruptcy stay in order to start foreclosure proceedings. In order to prevent the foreclosure, Mr. Sardariani arranged to have a friend, Shagen Galstanyan, pay off the debt owed to Harris Trust. In exchange, the Nikakhtars executed a new deed of trust in favor of Galstanyan securing $257,769. The deed of trust was prepared by Aver, the Nikakhtars' attorney.

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1 The relevant facts are derived from the Sardarianis' third amended complaint, as well as the documents referenced in and attached to the complaint. An appellate court reviews a complaint de novo to determine whether it contains sufficient facts to state a cause of action. (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 321-322.)

Mr. Nikakhtar delivered the new deed of trust to Mr. Sardariani on February 18, 2005. This deed of trust was "third" in priority behind the interests of GMAC and Tavakkoli.

On September 23, 2005, before the Nikakhtar-Sardariani escrow closed, GMAC foreclosed on its senior lien and the Nikakhtars' residence was sold to a third party. Galstanyan recorded his deed of trust against the residence on September 27, 2005, after the foreclosure, and assigned it to Mr. Sardariani on August 22, 2006.

The foreclosure trustee was holding about $450,000 in surplus proceeds that remained after satisfaction of the debt due to GMAC. The attorney for the foreclosure trustee, Edward Treder, informed Aver of this fact and, on September 1, 2006, Treder asked Aver if he knew of any other liens against the residence. Aver said he did not. Consequently, after paying off Tavakkoli, the holder of the junior deed of trust, Treder sent Aver the remaining amount of $300,000. Aver turned this money over to the Nikakhtars, his clients.

The Sardarianis sued Aver and the Nikakhtars. As to Aver, they alleged the deed of trust assigned to Mr. Sardariani created a lien in the amount of $257,769 that attached to the surplus proceeds Treder had turned over to Aver. Thus, they alleged, by the transfer of funds to his clients rather than to Mr. Sardariani, Aver interfered with the Sardarianis' right to possession of the surplus proceeds and is liable for conversion.

After several successful demurrers and amendments to the complaint, the trial court ruled the Sardarianis could not state a cause of action for conversion. The court sustained Aver's demurrer without leave to amend and entered a judgment dismissing the action.[2] This appeal followed.

DISCUSSION

The Sardarianis' central contention is that the deed of trust Galstanyan assigned to Mr. Sardariani created either a statutory or equitable lien against the surplus proceeds that

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[2] The action proceeded against the Nikakhtars for breach of contract and common counts. That part of the lawsuit is not before us.

remained after GMAC's foreclosure sale. Thus, they argue, by turning these proceeds over to his clients rather than to them, Aver acted contrary to their property rights and is liable for conversion. We reject this argument and hold that (1) even assuming a lien attached to the surplus proceeds, the Sardarianis failed to perfect their right to distribution of the proceeds from the foreclosure trustee, and (2) Aver's decision to turn the money over to his clients was not an act inconsistent with the Sardarianis' rights.

1. The Foreclosure Statutes Governing the Transaction

Conversion is the wrongful exercise of dominion over the personal property of another. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119.) The basic elements of the tort are (1) the plaintiff's ownership or right to possession of personal property, (2) the defendant's disposition of the property in a manner that is inconsistent with the plaintiff's property rights, and (3) resulting damages. (*Ibid.*) While neither legal title nor absolute ownership is necessary, the plaintiff must be entitled to immediate possession at the time of the conversion. (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 452.)

We are dealing in this case with surplus proceeds resulting from a nonjudicial foreclosure sale. Therefore, in order to determine whether the Sardarianis stated a cause of action for conversion against Aver, we consider whether the Sardarianis had an immediate right of possession. This, in turn, brings into play the foreclosure statutes and applicable case law.

A deed of trust creates a lien against the real property, thereby securing the underlying debt. (*Monterey S.P. Partnership v. W. L. Bangham, Inc.* (1989) 49 Cal.3d 454, 460; *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1235.)[3] When a

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[3] We note that under federal law, the lien of a deed of trust given to secure a loan made to a debtor after a bankruptcy has been filed violates the automatic stay and is generally unenforceable. (See 11 U.S.C. § 362(a)(4).) It is thus possible in this case that the deed of trust the Nikakhtars gave to Galstanyan after they had filed bankruptcy never created an enforceable lien against the residence. This issue was not raised by the parties and is not properly before us. Consequently, our analysis assumes the unrecorded deed of trust given to Galstanyan created a lien that was enforceable between the parties at the

debtor defaults on a secured real property loan, the lender-beneficiary may institute nonjudicial foreclosure proceedings to trigger a trustee's sale of the property to satisfy the obligation. (*South Bay Building Enterprises, Inc. v. Riviera Lend-Lease, Inc.* (1999) 72 Cal.App.4th 1111, 1120.) If the senior lienholder forecloses, the resulting sale conveys the property free of all junior liens, thus extinguishing the liens on the property. (*Bank of America v. Graves* (1996) 51 Cal.App.4th 607, 611-612.)[4]

More importantly, "Civil Code sections 2924 through 2924k provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust." (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830 (*Moeller*).) Section Civil Code section 2924j[5] provides that when proceeds remain after the beneficiary's debt is satisfied and all of the trustee's fees and expenses have been paid, the trustee is required to send written notice to those persons with *recorded* interests in the property entitled to notice prior to the foreclosure sale. (§§ 2924j, subd. (a) & 2924b, subds. (b) & (c).) The notice must inform each such person that there has been a trustee's sale; that he or she may have a claim to all or a portion of the remaining proceeds; that he or she may contact the trustee to pursue any possible claim; and before the trustee can act on any such claim, he or she must provide the trustee with certain written information and proof regarding the validity of the claim. (§ 2924j, subd. (a).)

Section 2924k prioritizes the distribution of proceeds from a trustee's foreclosure sale as follows: (1) to pay the trustee's fees and expenses in exercising the power of sale and conducting the sale; (2) to satisfy the debt to the beneficiary (lender); (3) to pay the

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time it was executed and delivered. (See 4 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 10:7, pp. 32-35.)

4 A "sold-out" junior lienholder may, nonetheless, sue the debtors directly on the promissory note underlying the "sold-out" lien. The note is then considered unsecured. (*Bank of America v. Graves, supra*, 51 Cal.App.4th at pp. 612-613; *Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35, 41-43.)

5 All undesignated statutory references are to the Civil Code.

obligations of secured junior lienholders in the order of their priority; and (4) to pay the balance, if any, to the trustor (i.e., the owner/borrower). (§ 2924k, subd. (a).)

Based upon the facts alleged by the Sardarianis, the applicable foreclosure statutes leave no doubt that they failed to state a cause of action for conversion against Aver because Mr. Sardariani had no right to immediate possession of the surplus proceeds from the foreclosure trustee. Mr. Sardariani did not record the Galstanyan deed of trust until *after* the foreclosure sale. Thus, the foreclosure trustee had no obligation to give Mr. Sardariani notice of the sale or of the availability of surplus proceeds. In addition, and most importantly, Mr. Sardariani never submitted a written claim to the foreclosure trustee with proof he had a valid security interest against the residence. The foreclosure trustee, and Attorney Treder, appropriately disbursed the remaining surplus proceeds to the Nikakhtars as mandated by section 2924k.

Accordingly, when Aver received the surplus proceeds on behalf of the Nikakhtars and turned the proceeds over to them, Aver was acting in accordance with the foreclosure statutes. The lien on the residence created by Galstanyan's deed of trust was extinguished by the foreclosure sale, and Aver, like the foreclosure trustee, was entitled to rely on the right to distribution of surplus proceeds in accordance with sections 2924j and 2924k. Aver did not act in a manner that was inconsistent with the Sardarianis' property rights. To the contrary, he was acting in allegiance to and accordance with his clients' interests, as was his legal obligation. (See *Hulland v. State Bar of California* (1972) 8 Cal.3d 440, 447-448 [an attorney owes a duty of fidelity to his client].) In short, the trial court did not err in ruling the Sardarianis had failed to state a cause of action for conversion against Aver.

2. Aver Did Not Interfere With any Lien Rights

The Sardarianis nonetheless argue the "right to distribution" under section 2924k is not essential to their claim because Mr. Sardariani had a lien that attached to the surplus proceeds at the time of the foreclosure sale, and thus Aver interfered with his lien rights by turning the proceeds over to his clients. We disagree.

Case law has long recognized that after a foreclosure sale, liens attach "to the

proceeds of the sales in the same manner, in the same order, and with the same effect, as they bound the premises before the sales were made." (*Markey et al. v. Langley et al.* (1875) 92 U.S. 142, 155; see also *Caito v. United California Bank* (1978) 20 Cal.3d 694, 701 ["Following a foreclosure sale and satisfaction of the obligation of the creditor who forecloses, subordinate liens against the foreclosed property attach to the surplus proceeds in order of their priority"]; *Nomellini Constr. Co. v. Modesto S. & L. Assn.* (1969) 275 Cal.App.2d 114, 118 (*Nomellini*) ["'If the net proceeds are sufficient to fully satisfy such obligation, any balance is called surplus, and subordinate liens and rights cut off as to the property by the sale attach to these surplus proceeds of sale in their order of priority'"]; *Pacific Loan Management Corp. v. Superior Court* (1987) 196 Cal.App.3d 1485, 1493 [secured debt "attaches to the security in its transmuted form as proceeds"].) Indeed, it appears the judicially created principle that surplus proceeds are to be used to satisfy junior liens before the balance is paid to the debtor was the basis for the enactment of section 2924k in 1990. (See *Passanisi v. Merit-Mcbride Realtors, Inc.* (1987) 190 Cal.App.3d 1496, 1504; *Nomellini*, *supra*, 275 Cal.App.2d at p. 118.)

But the mere fact a lien may attach to the surplus proceeds of a foreclosure sale does not mean the foreclosure trustee must recognize that lien if the lienholder has failed to perfect his or her right to distribution of the proceeds. As we have already noted, the foreclosure statutes provide a *comprehensive* framework for the regulation of a nonjudicial foreclosure sale. (*Moeller*, *supra*, 25 Cal.App.4th at p. 830.) That statutory framework requires that surplus proceeds be claimed and distributed in a very specific manner.

Even assuming Mr. Sardariani had a valid lien against the surplus proceeds, he did nothing to perfect or assert his lien rights, including recording the deed of trust or providing the foreclosure trustee with any notice of such a lien, not to mention providing the trustee with a valid written claim as required by section 2924j. Under these circumstances, Mr. Sardariani had no right to the distribution of the surplus proceeds in the hands of the trustee, and Aver did not interfere with any lien rights he may have had by turning over the proceeds to his clients.

3. Aver Did Not Have a Duty Toward the Sardarianis

Citing *McCafferty v. Gilbank* (1967) 249 Cal.App.2d 569 (*McCafferty*), the Sardarianis contend Aver is liable for conversion of the surplus proceeds because he had a duty to recognize Mr. Sardariani's lien and turn the proceeds over to them. We reject this contention.

In *McCafferty*, an ex-wife traded a lump-sum judgment she obtained for past due child support against her ex-husband in exchange for a percentage of litigation proceeds in the ex-husband's personal injury action against a third party. The ex-husband's attorney was intimately involved in the negotiations, preparing the agreement between his client and the ex-wife (assigning the litigation proceeds to her), and prosecuting the personal injury action. After the personal injury lawsuit was settled and the attorney received the proceeds, he cashed the checks with his client and personally kept the amount he considered his fees. The ex-wife was not paid, so she brought an action against the lawyer for conversion. The trial court granted a motion for nonsuit, ruling that as a matter of law the ex-wife did not have a property interest in the settlement proceeds and the attorney had no control over any funds to which she was legally entitled. (*McCafferty*, *supra*, 249 Cal.App.2d at p. 571.)

Finding the equities of the case favored imposition of an equitable lien and the reversal of nonsuit, the appellate court quoted from and applied the rule taken from a Massachusetts case, *General Exchange Ins. Corporation v. Driscoll* (1944) 52 N.E.2d 970, 973 (*General Exchange*), which held, "'"There was nothing in the defendant's status as attorney for [his client] . . . which made it his duty to pay to his client money which he knew . . . belonged to plaintiff. [Citations.] The defendant had complete control over the money. It was his duty to hold for the plaintiff so much of the proceeds . . . as represented the plaintiff's known interest in it."'" (*McCafferty*, *supra*, 249 Cal.App.2d at pp. 576-577, quoting *Miller v. Rau* (1963) 216 Cal.App.2d 68, 76, italics omitted.)

The principle from *General Exchange* was rejected in *Farmers Ins. Exchange v. Smith* (1999) 71 Cal.App.4th 660 (*Farmers*). In that case, an attorney represented a number of victims injured in automobile accidents and obtained medical payments for

them from their insurers. The insurers advised the attorney that under the terms of the policies they were entitled to reimbursement of any payments they made that the victim-policyholders recovered from third parties. After the attorney settled the lawsuits against the third-party tortfeasors, he subtracted his fees from the settlement proceeds and disbursed the balance to his clients. Instead of seeking reimbursement from the policyholders, the insurers sued the attorney for conversion, contending he had a duty to turn over to them the reimbursable amounts owed by his clients, the policyholders. (*Id.* at p. 663.)

The appellate court rejected the *General Exchange* rule, concluding there was no persuasive rationale for it. Holding the insurers had an adequate remedy by proceeding against the policyholders, the court stated, "Courts must not forget that the attorney's duty is to his or her client--that, after all, is the nature of their relationship. When an attorney is paid proceeds which are the result of the litigation instituted on behalf of the client, the attorney's duty is to turn over those proceeds to the client. . . . [T]he attorney has no choice but to turn over the balance of the proceeds to the client. Indeed, attorneys usually get into trouble if they *don't* pay over the balance to their clients." (*Farmers, supra*, 71 Cal.App.4th at pp. 670-671.) The *Farmers* court concluded that subjecting the attorney to a legal duty to reimburse another party "subjects the attorney to a most inequitable conflict between the client and an insurer in at least two situations. For one thing, the client simply may not want the attorney to pay the insurer's reimbursement claim, and may actually direct the attorney not to do so. For another, an even more painful conflict may be created when the proceeds of the litigation are insufficient to cover both the insurer's reimbursement claim and the attorney's fee." (*Id.* at pp. 671-672.)

We believe *McCafferty* is not applicable in this case and choose to follow *Farmers*. Unlike *McCafferty*, the Sardarianis allege that Aver turned over the entire $257,769 to his clients, keeping nothing for himself. Thus, there is no fundamental basis to conclude Aver personally acted in a manner that was inconsistent with Mr. Sardariani's rights merely by acting as a conduit for his clients. This is especially so

given Mr. Sardariani's failure to perfect and assert any lien rights under sections 2924j and 2924k, as we have discussed. The fact Aver knew his clients had earlier given Galstanyan a deed of trust against the residence is irrelevant because it was the foreclosure trustee, not Aver, who had the sole statutory responsibility to distribute surplus proceeds in accordance section 2924k. (See § 2924j, subd. (b) [foreclosure trustee has responsibility to exercise due diligence in determining priority of the written claims received for surplus proceeds].)

More importantly, however, we agree with *Farmers* that an attorney owes his or her primary allegiance to his client. When, as in this case, an attorney representing a foreclosed homeowner receives surplus proceeds from the foreclosure trustee on behalf of his clients, the attorney is obligated to turn those funds over to his clients and is not liable for conversion, especially when no other lienholder has asserted a valid claim to those proceeds under section 2924j. To hold otherwise would, as *Farmers* found, subject the attorney to an inequitable and unjustifiable conflict of interest.

4. Conclusion

We hold in this case that the Sardarianis cannot state a cause of action for conversion against Aver because Mr. Sardariani failed to perfect and assert any lien rights he may have had by not following the requirements of sections 2924j and 2924k. Mr. Sardariani did not have an immediate right to possession of the surplus proceeds in the hands of the foreclosure trustee and, by turning these proceeds over to his clients, Aver did not act in a manner inconsistent with the Mr. Sardariani's rights. We do not consider or decide whether the Sardarianis may assert a lien or other rights against the Nikakhtars.[6]

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[6] Aver requested that we take judicial notice of the trial court's statement of decision involving the trial of other parties. As that statement of decision is not germane to our opinion in this appeal, the request is denied.

DISPOSITION

The judgment is affirmed. Aver is to recover his costs.

RUBIN, Acting P. J.

We concur:

FLIER, J.

BIGELOW, J.